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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-122

PACKERLAND PACKING COMPANY, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit

JAMES A. GILKER
Attorney for Petitioner

Post Office Box 3365
Station A
Fort Smith, Arkansas 72901
(501) 783-3109

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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Petitioner, Packerland Packing Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on May 3, 1974. A timely petition for rehearing, en banc, was denied by a divided Court on May 20, 1974.

OPINIONS BELOW

The divided opinion of the Court of Appeals, printed in Appendix B, is reported at 494 F.2d 293 (CA 7, 1974); the decision and order of the National Labor Relations Board (hereinafter "The Board") is reported at 203 NLRB No. 39 and is reproduced in printed Appendix C; and the decision and recommended order of the Administrative Law Judge, formerly designated "Trial Examiner", is printed in Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on May 3, 1974, rehearing denied on May 20, 1974. This petition for certiorari was filed within 90 days of the latter date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Seventh Circuit was in error in its application of the **Universal Camera Corp. v. NLRB,** 340 U.S. 474 (1951), principles in a case in which the Board reversed the Administrative Law Judge's recommendations, accepting his credibility findings to the extent the Board's reversal comported with those findings but ignoring those material and substantial credibility findings going to the heart of the case, and in effect, substituting its own credibility findings for those made by the Administrative Law Judge.

2. Whether the Court of Appeals for the Seventh Circuit erred in affirming the Board's reversal of the Administrative Law Judge's decision to put to arbitration under *Collyer Insulated Wire,* 192 NLRB No. 150, the matter of the transfers

when both Unions involved had indicated that they would process grievances for the affected employees to arbitration.

3. Whether the Court of Appeals for the Seventh Circuit erred in affirming a broad sweeping Board order which sought to restrain the Petitioner from discouraging "membership in . . . any other labor organization," or from "in any other manner" discriminating against its employees and "in any other manner" interfering with, restraining or coercing its employees in the exercise of their rights to "form" or "join" a labor organization or to "bargain collectively through representatives of their own choosing," in the case of an isolated incident of unlawful conduct as found by the Board, in light of the principles set forth in *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.), (hereafter "Act"), are set out in Appendix E hereto.

STATEMENT OF THE CASE

A. Factual Background

The instant case concerns an unfair labor practice complaint filed by General Counsel of the Board alleging that Petitioner, Packerland Packing Company, Inc. (herein Packerland), discriminatorily transferred employees Ted R. Rockwell, Charles Petty and Ronald Whiting in violation of 29 U.S.C. Sec. 158 (a)(1) and Sec. 158(a)(3) (herein 8(a)(1) and 8(a)(3) of the Act).

Packerland is engaged in slaughtering beef, processing beef products and rendering by products, at its plant at Green Bay,

Wisconsin. For some time prior to September 1970, the Independent Packerland Employees Union (herein Independent) was the collective bargaining agent for all production and maintenance employees and truck drivers of Packerland including among others city truck drivers. In September 1970 the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (herein Amalgamated) carved out of the existing Independent union by Board certification all production and maintenance employees but excluding among others truck drivers. Within the group of truck drivers there were four subgroupings including a group known as city drivers. The unit placement of these city drivers remained a contested issue between Packerland and Amalgamated during negotiations.

There was an economic strike over Amalgamated negotiations commencing June 1, 1971 observed by Amalgamated bargaining unit members, and four truck drivers. The four truck drivers included three city drivers, Rockwell, Petty and Whiting, the alleged discriminatees, and one rendering department driver named Peterson. During the short lived strike of June 1 and 2 approximately 250 employees participated in the strike and the Company hired approximately 125 replacements (R. 221).[1]

To settle the strike and get the employees back to work, Packerland and Amalgamated met in the Green Bay offices of Federal Mediation and Conciliation Service on June 2, 1971 and reached the following strike settlement understanding: A collective bargaining agreement between Packerland and the Amalgamated effective from June 1, 1971 through February 28, 1975,[2] and a memorandum, made a part of the foregoing agreement, governing the recall of "all" strikers.

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[1] "R" refers to the separate appendix to the briefs in the Court below.

[2] The *Recognition Article* of the Amalgamated agreement retained the language of the Board's certification and reads in pertinent part as follows: "The Company recognizes the Amalgamated as the sole collective bargaining agent for all production and maintenance em-

During the negotiations leading to the strike settlement agreement Packerland's President Frankenthal and Amalgamated's chief spokesman Wentz had private meetings on June 2 where, according to Circuit Judge Pell's summary of these events in his dissenting opinion, which clearly reflect the facts of record as credited by the Administrative Law Judge, the following ensued:

"At one of these meetings Frankenthal said, 'Ray, now are we all settled?' Wentz answered, 'Yes, except for one thing. I want you to take back all the people who are now out. I have to get them off the concrete.' Frankenthal replied, 'Ray, there is a few people that I don't think are in your union that are out.' Wentz said 'you take them back in my union.' During these discussions Frankenthal also told Wentz that he 'could not promise that each person would have their own kind of job that they had previous to the strike; but that we would put them to work—some kind of work . . .' On the same day Frankenthal told Wentz and Mat Pinter, an Amalgamated representative, 'I'll take these people back. How soon I just can't tell you, but I'll take them back, and they'll go in the unit.' Thereafter a memorandum of understanding was reached whereunder the parties agreed that:

> 'All employees who participated in the strike on June 1 and June 2, 1971, will be called back to the employment of the employer as the needs of the business require. It is understood and agreed that such callbacks will be made as expeditiously as possible in seniority, as qualified, but nothing in the agreement between the parties shall require the employer to displace any current employeees from employment to effect such call back. . . . However, the

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ployees of the Employer at its Green Bay, Wisconsin, plant, excluding office clerical employees, truck drivers . . . and agrees to deal only with the duly authorized representatives of the Union on all matters relating to grievances, wages, hours, and other conditions of employment." (R. 261).

parties have agreed in good faith to call back employees as soon as possible in accordance with the requirements of the business.' "[3]

When the strikers started to return to work, the three city truck drivers, Rockwell, Whiting and Petty, returned to the city truck driving on June 4, 1971.

The following program arose according to the credibility findings of the Administrative Law Judge, and in the words of Judge Pell in his dissenting opinion, was disposed of in the following way:

> "On June 4, the plant superintendent was called by Frankenthal to account for all the people who had been recalled. During this accounting the names of Whiting, Rockwell, and Petty were mentioned. Apparently, acting upon the basis that the city truck drivers were not in the production and maintenance unit represented by Amalgamated, at least as that unit was defined by Frankenthal, he commented that Packerland might be 'at fault for calling them back into an area where they're not in the unit.' He instructed the superintendent to proceed accordingly."

Additionally, the Administrative Law Judge found that rendering truck driver Peterson, a fourth driver who had been on

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[3] During the hearing the Administrative Law Judge received the following answer from Wentz concerning the parties' agreement on the recall of strikers:

> "Q. (Trial Examiner) Now, what was your agreement with respect to all the strikers that were out on strike?
>
> A. (Ray Wentz) They would all be returned to work with seniority and their ability and the understanding also was because there was over a hundred people there that were strike breakers —that we would not fire them or get rid of them so to speak; but he assured me that he was intending to enlarge the crew, and he said that it would be only a short time—we will have them all back to work. I'll cooperate as much as I possibly can to see that they are taken care of, and I think he did that pretty well". (R. 255-256)

strike, was also mentioned during the above discussion and that Peterson was subsequently offered a job in the Amalgamated unit, which Peterson declined, resulting in Peterson's employment elsewhere.

On June 5th Rockwell, Petty and Whiting were advised by Frankenthal that they "were not in the trucking unit and they would be placed in the plant . . . into the bargaining unit which now represented them." The three were then assigned to undisputedly Amalgamated bargaining unit jobs: Petty and Whiting to the boning room[4] and Rockwell to the loading dock.

The transfers of Rockwell, Petty and Whiting are the basis of the unfair labor practice charges resulting in the present proceeding principally on the grounds of a finding made by the Administrative Law Judge concerning the above meeting on June 5th, which was described by Judge Pell in his dissenting opinion as follows:

> "At the time of this conference, Frankenthal read (although this was disputed) from a letter of a truck dispatcher that 'due to the fact that (the alleged discriminatees) did not report to work on Tuesday and Wednesday of that week that (they) were no longer considered reliable and he (the

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[4] Frankenthal promised Wentz that Packerland would retain the replacements hired during the strike and would call all the strikers back within 10 days (R. 235-236). As there were approximately 125 striker replacements, plus 250 strikers to be recalled, to accommodate this additional number of employees with the return of all strikers, Packerland had to set up a second shift "boning" room operation which would absorb approximately 80 employees in addition to Packerland's pre-strike complement (R. 223-224), besides making a number of additional transfers in the plant (R. 242-243, 244). Frankenthal advised Wentz that he ". . . could not promise that each person would have their own kind of job that they had prior to the strike but that he would put them back to work . . ." (R. 14, 236). The Company did absorb the recalled strikers within the time stated and Amalgamated representative Wentz admitted he thought Packerland did "pretty well" (R. 15, 223-224, 255-256).

truck dispatcher) did not want (them) driving for the company no more.' "

At the hearing on this matter, upon Motion by Packerland, the Independent and the Amalgamated unions were made parties to this proceeding. Packerland and the Independent each moved to defer the matter of the transfers to arbitration pursuant to the Board's decision in *Collyer Insulated Wire*, 192 NLRB No. 150 offering to arbitrate grievances which Rockwell, Petty and Whiting may file. The Amalgamated also stated it would process a grievance relating to the transfers if the three employees were found to be in its unit. Copies of the Amalgamated and the Independent unions' collective bargaining contracts were submitted at the hearing.

B. **The Administrative Law Judge's Decision and Recommended Order.**

The Administrative Law Judge found and concluded that Packerland's sole motive in transferring Rockwell, Petty and Whiting was to fulfill its understanding of the memorandum on recall of strikers, and hence, the transfers did not violate Section 8(a)(3) of the Act. He did find and conclude that Packerland violated Section 8(a)(1) of the Act by reading a letter from Packerland's dispatcher to the three employees finding same to be coercive interference under the Act. He further concluded that Packerland "arguably" violated its collective bargaining agreements with the Independent and the Amalgamated by transferring the aforesaid employees to other jobs after the strike, and in view of the motion to defer by the Independent and Packerland, he recommended that the issue whether Packerland complied with its contractual obligations in making these transfers be deferred to arbitration.

C. **The Board's Decision and Order.**

The Board found that Packerland violated Section 8(a)(3) of the Act, reversing the Administrative Law Judge's finding, based on substantial credibility findings, concerning Packerland's motive in making the transfers, and relying principally on the Administrative Law Judge's finding, on disputed evidence, that Frankenthal read to the three employees a letter from Packerland's dispatcher on their transfer. Without finding whether or not Packerland complied with its collective bargaining agreement's obligations by effectuating the transfers, the Board concluded that the transfers interfered with the rights of said employees in violation of Section 8(a)(1) of the Act even if Packerland had a sole "good faith" motive.

The Board dismissed the Administrative Law Judge's recommendation that an issue whether Packerland complied with its collective bargaining agreements in effectuating said transfers be deferred to arbitration under its collective bargaining agreements, principally because the evidence was unclear as to which agreement, if any, covered the three employees.

The Board entered a broad order based on its findings and conclusions, the order, in part, directing Packerland to cease and desist from "discouraging membership in" the Amalgamated "or any other labor organization" by transferring employees or discriminating against them "in any other manner" and directing Packerland to cease and desist from "in any other manner" interfering with, restraining or coercing its employees.

D. **The Decision of the Court of Appeals.**

On Packerland's petition for review and the Board's cross-application for enforcement, the majority of the Court of Appeals for the Seventh Circuit affirmed the Board's decision. 29 U.S.C. § 160(e)(f).

Pertinent to this petition, Judge Pell, in his dissenting opinion, would conclude that the Board's disagreement with the Administrative Law Judge's finding, crediting Frankenthal's version of negotiations, was contrary to the recognition to be given credibility determinations of examiners. Additionally, he would find deferral to arbitration appropriate in view of the Independent and Amalgamated's stated willingness to process grievances concerning the transfers. Thirdly, he would find that the Board's order is too broad when only one act is involved, relating to an ambiguous situation, and where there is no evidence of persistent anti-union conduct.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises an Important Question Concerning the Review of Findings of the National Labor Relations Board.

After a hearing held on this matter, the Administrative Law Judge found and concluded that the Company did not violate Section 8(a)(3) of the Act by transferring Rockwell, Whiting and Petty. The Administrative Law Judge's findings were based upon the whole record and "upon his observation of the witnesses". Relying upon *NLRB v. Brown*, 380 U. S. 278, 287, for the proposition that the "real motive" of the employer is decisive in determining whether there is an 8(a)(3) violation, the Administrative Law Judge found that Frankenthal's sole motive in transferring Rockwell, Whiting and Petty was "to fulfill his understanding of the commitment to Wentz to return the employees who had ceased work during the strike to the Amalgamated unit" and that the transfers of Rockwell, Whiting and Petty were, therefore, not discriminatory.

Underlying the Administrative Law Judge's finding and conclusion is overwhelming evidence that the Amalgamated unit excluded "truck drivers" by Board certification, that the Amalgamated and Packerland continued to disagree during lengthy negotiations over the inclusion of city drivers in the Amalgamated unit, and that the Amalgamated's collective bargaining agreement finalized on June 2, 1971 excluded "truck drivers". Further, the Administrative Law Judge credited Frankenthal's testimony that during discussion of the strike recall memorandum, when Frankenthal had mentioned the problem with recalling individuals outside the Amalgamated unit, Wentz responded "take them back in my Union". The strike recall memorandum undisputedly calls for the recall of "all" strikers "in seniority, as qualified" and that since the memorandum was a part of the

Amalgamated agreement the "seniority" thereunder could only refer to seniority under the Amalgamated agreement.

The Administrative Law Judge further found that when Frankenthal heard on June 4, 1971 that recalled truck drivers were being returned to truck driving jobs, Frankenthal feared that Packerland would be "at fault" for calling these drivers back to jobs "not in the unit", and that he directed reassignment of those recalled drivers. The Administrative Law Judge also found that on June 5, Frankenthal specifically advised Rockwell, Petty and Whiting that he was putting them in the Amalgamated bargaining unit that now represented them. Additionally, the other striking truck driver, Peterson, was presented with a similar transfer and there was no claim of discrimination on his behalf by the Board.

In addition to the foregoing findings, other undisputed evidence in the record reveals that following the settlement Packerland proceeded with the rapid recall of 250 strikers, which, by retaining replacements hired during the strike, ballooned Packerland's work force and resulted in dislocations anticipated by both the Amalgamated and Packerland. To meet this expansion the Company began a second shift boning room operation, the area to which Petty and Whiting were specifically assigned.

The Board's disagreement with the Administrative Law Judge is principally[5] based on the Administrative Law Judge's finding to the effect that Frankenthal, on June 5th, read to Rockwell, Petty and Whiting, a letter from Packerland's dispatcher indicating that the three drivers were not considered re-

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[5] The Board also asserted that its findings was buttressed by a finding that the question of whether the city drivers were in the Amalgamated unit or not was never resolved. This lends little support to the Board's finding and conclusion because it is clear from other findings that at least, the Company had a reasonably grounded belief that the issue was resolved in favor of exclusion of the city drivers from the Amalgamated unit.

liable because they had not reported to work on June 1 and 2 and that the dispatcher did not want them driving for Packerland. This single finding was considered coercive by the Administrative Law Judge but not proof that the Employer had an unlawful motive in transferring the three employees.

A brief review of the facts described above will reveal that the Board had substituted its own findings for those of the Administrative Law Judge when the Administrative Law Judge's findings are supported by substantial evidence in the record, credited by the Administrative Law Judge. Before this Court, the Company urges the conclusion expressed by Judge Pell in his dissenting opinion below.

The Board has held that it is the Board's policy "to attach great weight to a Trial Examiner's credibility findings insofar as they are based upon the demeanor" and to "not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of all the relevant evidence convinces us that the Trial Examiner's resolution was incorrect." *Standard Drywall Products, Inc.*, 91 NLRB No. 103. This decision has been cited with approval in numerous other decisions of the Board, more recently in *Smith and Wesson*, 174 NLRB No. 152.

The Court in *NLRB v. Agawam Food Mart*, 424 F. 2d 1045 (CA 1, 1970), rejected the Board's reversal of an Administrative Law Judge's findings because "clear preponderance of the evidence was not contrary to any of the existing credibility resolutions; nor did the Board say it was." (424 F.2d 1046).

Additionally, after reviewing the legislative history concerning the deference due the examiner's findings, this Court concluded in *Universal Camera Corp. v. NLRB*, *supra*,

> "We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The 'substantial evidence' standard is not modified in any way when the Board and its

> examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board than when he has reached the same conclusions. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony". (340 U.S. at 496, 497).

Petitioner respectfully submits that the Board has, by singling out only a portion of the record as against substantial and credited evidence to the contrary, embarked upon a severe test of the "substantial evidence" rule as stated in *Universal Camera Corp., supra,* and that this is an appropriate case for review under *Universal Camera* where the Court stated:

> "Whether on the record as a whole there is substantial evidence to support agency findings is a question of which Congress has placed in the keeping of the court of appeals. This court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." (340 U.S. 491).

2. **The Decision Below Conflicts in Principle With Decisions of the National Labor Relations Board and a Decision of the United States Court of Appeals for the Ninth Circuit.**

The Board has committed an egregious error, prejudicial to the interests of the Petitioner as well as the parties, and in derogation of National Labor Policy of private autonamous settlement of industrial disputes under the peaceful processes of grievance-arbitration.[6]

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[6] The Amalgamated agreement's Recognition Article covered "all production and maintenance employees . . . excluding truck drivers" and the Independent agreement's Recognition clause covered ". . . all truck drivers" (R. 6-7, fn. 2).

The Board error is that it has confused a unit placement question with a straightforward question of contract interpretation. The Board did not decide who had jurisdiction over the city drivers. Here there is a case where the three employees were covered either by the Independent contract or the Amalgamated's contract, including the latter's memorandum on recall of strikers.[7] As the Company views this matter Rockwell, Petty and Whiting could bring their grievances under either of the agreements. Both unions were willing to represent them, the Independent without reservation. No matter how this matter is approached the Employer in transferring the three employees either violated one or both of these agreements, or it did not.

The principal thrust for the Board's refusal to defer the matter of the transfers to arbitration under the appropriate agreement was that "it is not clear whether the city truck drivers belonged to either unit at the time of the transfers." This basis for refusal to exercise its discretionary authority to defer to arbitration does, in the Petitioner's view, avoid the crucial question. In the Petitioner's view, the Board's asserted reasons for refusing to defer in this matter is inconsistent with its prior decisions relating to the appropriateness of deferral where application of a collective bargaining agreement lies at the core of the issues before the Board in an unfair labor practice matter and the Board's decision in *Urban N. Patman*, 197 NLRB No. 150 (1972) where deferral was ordered. The United States Court of Appeals for the Ninth Circuit on review of the Board's decision in *Urban N. Patman* stated:

> "Although the characterization of the dispute as one involving the interpretation of a contract, rather than existence of a contract, is not wholly free from doubt, we can-

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[7] Underlying the decisions in this matter is the fact that there has been no dispute that both the Independent and the Amalgamated agreements contain disputes resolution provisions, e.g. grievance-arbitration provisions.

not say that the Board abused its discretion in concluding that the contract interpretation was the gravamen of the dispute." *Provision House Workers v. NLRB (Urban Patman, Inc.)*, 493 F.2d 1249 (CA 9, 1974).

In *Urban Patman* the Board's majority, in disagreement with the Trial Examiner, found merit in the Respondent's contention that the dispute "is arguably one of whether the contract covers the precooked foods department and not one of wages". The majority continued, in discussing the potential argument in that case that wage disputes are not arbitrable, "Moreover, arbitrability of such disputes is properly determinable by an arbitrator."

In reversing a Trial Examiner's refusal to defer a matter to arbitration, the Board found, in *Coppus Engineering Corp.*, 195 NLRB No. 113, 79 LRRM 1449 (1972), that the issues in that matter basically involved "a question of contract interpretation" and that the position taken by the Employer in that matter was "not patently erroneous, but was based upon a reasonable interpretation of ambiguous . . . provisions", citing the numerous provisions of the collective bargaining agreement which were relevant. As a result, the Board held, in *Coppus Engineering Corp., supra*, that "(a)s we stated in *Collyer Insulated Wire*, 192 NLRB No. 150, where 'contract and its meaning . . . lie in the center of the dispute and the parties' contract contains voluntary arbitration machinery to resolve such disputes deferral to arbitration will best effectuate the purposes of the Act."

The issue whether Packerland interfered with the rights of its employees by transferring them pursuant to the "Memorandum of Understanding" regarding the recall of "all" strikers clearly requires interpretation of the phrase "seniority, as qualified", the factor governing employee recalls. The Board's refusal to consider the parties' intent regarding this factor, in

light of the appropriate provisions of the collective bargaining agreements' "seniority" and other provisions and its refusal to defer the interpretation of this language to arbitration under either the Amalgamated or the Independent agreement was clear error. The Board's rationale for refusing deferral to arbitration because "it is not clear whether the city truck drivers belonged in either unit at the time of the transfers" avoids the crucial contract issues involved in the matter.[*]

The *Collyer* doctrine has been approved by a number of courts of appeals. Deferral has been approved in *Nabisco, Inc. v. NLRB*, 479 F.2d 770 (CA 2, 1973); *Associated Press v. NLRB*, 492 F.2d 662 (CA D.C., 1974); *Enterprise Publishing Company v. NLRB*, 493 F.2d 1024 (CA 1, 1974); *Provision House Workers Union v. NLRB, supra*. Concern for protection of statutory rights has been allayed in view of the Board's policy to retain jurisdiction to revive the case, in *Collyer* deferrals, if for some reason the arbitration does not take place, or if the procedures are not fair or the outcome is "repugnant to the Act".

In summary, it is the Petitioner's position that where, as here, there are in effect collective bargaining agreements providing grievance and arbitration provisions leading to a final and binding decision of an arbitrator relative to contractual rights of employees, and the agreements' language provides rights which touch and concern the unfair labor practice alleged, that

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[*] Packerland's position on jurisdiction in arbitration of this matter is as follows: The city drivers job classification is included under the Independent agreement as "truck drivers". However, upon the transfer they became "production" employees, subject to the Amalgamated agreement. In the latter circumstances, the affected employees had a right to grieve and arbitrate their specific job assignments in the Amalgamated's "production" unit, subject to the Amalgamated agreement's terms, including the strike recall memorandum. In the former circumstance, if they so elect, the individuals could grieve and arbitrate under the Independent agreement any rights they may have to jobs within the Independent unit.

the Board should, in the proper exercise of its discretion, defer such matters to arbitration, thereby leaving to the parties in the first instance the right to adjust their disputes which relate to the application of the agreement. Thereafter, should the Board perceive that the pertinent statutory rights are not being protected through the processes of collective bargaining then it may reassert its retained jurisdiction to resolve and protect the statutory rights violated. This appears to be the thrust of *Collyer*. To hold otherwise, it is submitted, can only add instability to collective bargaining relationships. As Judge Pell astutely observed in his dissenting opinion below concerning the appropriateness of deferral in this matter:

> "As I have indicated hereinbefore, if the matter had gone to arbitration, no doubt this troublous point in industrial relations of the Company would have long since been settled." (494 F.2d at 297).

3. **The Order Enforced Below Conflicts in Principle With a Decision of This Court.**

The Board's Order in this matter is sweeping in scope, broadly commanding Packerland to cease and desist from actions often having little resemblance to the specific violations which even the Board found. The Board's broad order enforced by the Court of Appeals directed Packerland to cease and desist from "in any other manner" of interference or discrimination. Petitioner respectfully submits that such a broad order is not justified by the Board's own findings and conclusions in this matter in view of the fact that the Board's own findings and conclusions, which are contrary to the Administrative Law Judge's findings and conclusions, are of at least dubious substantiality and the Board's findings and conclusions rest essentially on one alleged act, the reading of a letter in an ambiguous situation.

In *NLRB v. Express Publishing Company*, 312 U.S. 426, 437 (1941), this Court defined the scope of the Board's authority as follows:

> "Having found the acts which constitute the unfair labor practices the Board is free to restrain the practice and other like or related acts."

From the above, a Board order limited to restraint of "like or related" violations appears entirely permissible; however, the restraint of "any other" violation appears to require further compelling evidence "that they bear some resemblance to that which the employer has committed or that the danger of their commission in the future is to be anticipated from the course of this conduct in the past" (312 U. S. at 437).

In *Fremont Newspapers, Inc. v. NLRB*, 436 F.2d 665, (CA 8, 1970), two isolated acts in violation of Section 8(a)(1) of the Act were found to be insufficient for a broad Board order to cease "in any other manner" Section 8(a)(1) violations. The Court of Appeals noted the absence of a proclivity on the employer's part to violate statutory rights. See also, *Southwire Company v. NLRB*, 383 F.2d 235, 237 (CA 5, 1967).

We recognize that in *P. R. Malloy & Co. v. NLRB*, 400 F.2d 956, 959 (CA 7, 1968), cert. den. 394 U.S. 918 (1969), only a singular violation was found to support a broad Board order; however, the employer's prior proceedings in that matter raised some question concerning future conduct. The Board, in issuing its broad order in this matter, cites no past misconduct on Packerland's part which, in view of the ambiguous situation out of which the charges in this matter flowed, should raise serious question as to the excessive nature of the Board's order concerning "any other" violations involving Sections 8(a)(1) and (3) of the Act.

CONCLUSION

For the following reasons, Petitioner respectfully submits that a Writ of Certiorari should be granted.

JAMES A. GILKER
P. O. BOX 3365, Station A
Fort Smith, Arkansas 72901
Attorney for Petitioner

APPENDIX

APPENDIX A

Court of Appeals Order Denying Petition for Rehearing

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

May 20, 1974

Before
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. John Paul Stevens, Circuit Judge.
Hon. Robert A. Sprecher, Circuit Judge

Packerland Packing Company, Inc., Petitioner,

No. 73-1518. vs.

National Labor Relations Board, Respondent.

Petition for Review of an Order of the National Labor Relations Board.

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and a majority of the members of the panel having voted to deny a rehearing,*

It Is Ordered that the petition for a rehearing in the above-entitled cause be and the same is hereby Denied.

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* Judge Pell voted to grant the petition for rehearing.

APPENDIX B

Court of Appeals Opinion

In the
United States Court of Appeals
For the Seventh Circuit

September Term, 1973 January Session, 1974

No. 73-1518
Packerland Packing Co., Inc., Petitioner,
v.
National Labor Relations Board, Respondent.

Petition for Review and Cross-Application for Enforcement of Order of National Labor Relations Board.

Argued February 15, 1974—Decided April 3, 1974

Before Pell, Stevens and Sprecher, Circuit Judges.

Per Curiam. The petitioner Company has sought review of, and the Board has applied for enforcement of, a Board order finding that the Company violated Sections 8(a)(3) and (1) of the Act by transferring employees Ted R. Rockwell, Charles Petty and Ronald Whiting because of their union activity. 203 NLRB No. 39.

The employees were city truck drivers who joined the picket line during a June 1-2, 1971 strike by the certified representative of the Company's production and maintenance employees. The strike was settled and the employees returned to work as city truck drivers on June 4. The Board found that "the matter of whether the city truck drivers were in the . . . unit or not was never resolved, and [the union] . . . had not abandoned its claims over these employees." 203 NLRB No. 39, p. 5.

On June 5, the three employees were told that "they would be placed into the bargaining unit which now represents them."[1] Whiting and Petty were assigned to the boning room and Rockwell to the loading dock. On June 7 while performing one of the most exacting jobs in the Company's operation, Rockwell aggravated an old injury. On June 8, Whiting, who was required to stand all day in his new assignment, also aggravated an old injury.

In addition to cease and desist requirements, the Board ordered the three employees reinstated to their city truck driving jobs and made whole for any loss of earnings suffered as a result of the discrimination.

Substantial evidence on the record as a whole supports the Board's finding and order.

Petition for Review Denied and Order Enforced.

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[1] At this time the Company's president, Frankenthal, read to the three employees from a letter written by their supervisor, which stated that these employees were unreliable because they had not worked on June 1 and 2 and that he did not want them driving for the Company in the future. The administrative law judge credited testimony that the letter was read to the employees.

Pell, Circuit Judge, dissenting.

I fail to find this case as free of complexities as apparently the majority opinion does, and therefore I respectfully dissent.

This appears to be a case in which the National Labor Relations Board has accepted the Administrative Law Judge's decision based upon credibility finding to the extent that the decision conformed to the Board's determination of the proper disposition of the case, but ignored those credibility findings when the converse was true and in effect substituted its own credibility findings for those of the Administrative Law Judge.

For some time prior to September 18, 1970, the Independent Packerland Employees Union (Independent) was the collective bargaining agent for all production and maintenance employees of Packerland, including, *inter alia*, truck drivers. On September 18, 1970, the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (Amalgamated), was certified by the Board, in a unit consisting of all production and maintenance employees of Packerland at its Green Bay, Wisconsin plant, excluding, *inter alia*, truck drivers.

Packerland employed 16 truck drivers in its rendering division, 18 or 20 over-the-road truck drivers, and 3 city truck drivers. The alleged discriminatees involved in the present case, Rockwell, Whiting, and Petty, were the 3 city truck drivers.

A point of controversy between Packerland and Amalgamated was whether the 3 city truck drivers were within the unit represented by Amalgamated. That point of dispute remained unresolved after the Administrative Law Judge's decision, after the Board's decision, and will still remain unresolved after this court's order of enforcement. It remains a festering source of labor disharmony, which apparently would have lent itself to resolution some time ago if the Administrative Law Judge's order, to which Packerland did not object, had been followed.

Apparently, contract negotiations between Amalgamated and Packeralnd were not successful because a strike ensued on the following June 1, which was resolved the next day by an agreement on the terms of the contract. This agreement, however, did not in its terms resolve the bone of contention which is involved in the present case.

During the strike a picket line was established at the Packerland premises. Rockwell, Whiting, and Petty joined the picket line. Approximately 125 employee replacements were hired by Packerland during the short-lived strike. Whiting and Petty and the truckdrivers in the rendering division had appeared on the *Excelsior* list, and the voters' eligibility list for the election in which Amalgamated was chosen as the bargaining agent. Whiting and Petty had in fact voted in the election without challenge.

On June 2, representatives of Amalgamated and Packerland met in the offices of Federal Mediation and Conciliation Service in Green Bay. During that day there were private meetings between Packerland's President, Frankenthal, its attorney, and Amalgamated's chief spokesman, Wentz.

At one of these meetings Frankenthal said, "Ray, now are we all settled?" Wentz answered, "Yes, except for one thing. I want you to take back all the people who are now out. I have to get them off the concrete." Frankenthal replied, "Ray, there is a few people that I don't think are in your union that are out." Wentz said, "You take them back in my union." During these discussions Frankenthal also told Wentz that he "could not promise that each person would have their own kind of job that they had previous to the strike; but that we would put them to work —some kind of work . . ." On the same day Frankenthal told Wentz and Mat Pinter, an Amalgamated representative, "I'll take these people back. How soon I just can't tell you, but I'll take them back, and they'll go in the unit." Thereafter a memorandum of understanding was reached whereunder the parties agreed that:

> "All employees who participated in the strike on June 1 and June 2, 1971, will be called back to the employment of the employer as the needs of the business require. It is understood and agreed that such call-backs will be made as expeditiously as possible in seniority, as qualified, but nothing in the agreement between the parties shall require the employer to displace any current employees from employment to effect such call back. . . . However, the parties have agreed in good faith that a reasonable effort will be made to call back employees as soon as possible in accordance with the requirements of the business."

All strikers ultimately returned to work.

After the strike was terminated the three truckdrivers returned to the truckdriving jobs they had performed immediately prior to the strike and worked as city truckdrivers on June 4 and 5.

On June 4, the plant superintendent was called by Frankenthal "to account for all the people who had been recalled." During this accounting the names of Whiting, Rockwell, and Petty were mentioned. Apparently, acting upon the basis that the city truckdrivers were not in the production and maintenance unit represented by Amalgamated, at least as that unit was defined by Frankenthal, he commented that Packerland might be "at fault for calling them back into an area where they're not in the unit." He instructed the superintendent to proceed accordingly.

On June 5, Whiting, Petty, and Rockwell were called to the office of Frankenthal where, in the presence of the superintendent, Frankenthal told them they were "not in the trucking unit and they would be placed into the plant . . . into the bargaining unit which now represented them." The three were assigned to the areas within the plant, which assignment is the basis of the unfair labor practice charges resulting in the present proceedings

before this court. At the time of this conference, Frankenthal read (although this was disputed) from a letter of a truck dispatcher that "due to the fact that [the alleged discriminatees] did not report to work on Tuesday and Wednesday of that week that [they] were no longer considered reliable and he [the truck dispatcher] did not want [them] driving for the company no more."

Subsequently, a complaint was issued in which it was alleged that Packerland had violated §8(a)(1) and (3) of the Act by discriminatorily transferring Rockwell, Petty, and Whiting to more physically exhausting jobs because said employees respected a picket line at the Packerland premises and by constructively discharging Rockwell and Whiting because the work assigned to them aggravated pre-existing job-related injuries causing them to cease work. At the time the case came on for hearing, Packerland objected because Amalgamated and Independent were not made parties. Subsequently, they were made parties.

While the Administrative Law Judge did not credit either Frankenthal or Rockwell entirely, he did, as a matter of credibility, find the facts as they have been heretofore set out, with particular reference to the June 5 conference among the three men and Frankenthal.

Directing his attention to the alleged §8(a)(3) violation, the Administrative Law Judge, on the basis that the real motive of the employer is decisive, *NLRB* v. *Brown*, 380 U.S. 278, 287 (1965), determined that Frankenthal's sole motive in transferring the three men was to fulfill "his understanding of the commitment to Wentz to return the employees who had ceased work during the strike to the Amalgamated unit" and therefore the transfers were not discriminatory. Frankenthal had done the same as to a driver from the rendering plant, who had observed the picket line, who was transferred into what Frankenthal conceived to be the unit, which, he contended,

did not include truckdrivers. The Administrative Law Judge reached no conclusion as to whether Frankenthal was correct in his contract interpretation but merely that this was his motivation.

Accordingly, no violation was found in the transfer. The Administrative Law Judge, however, did find that Packerland violated §8(a)(1) by the reading of the truck dispatcher's letter to the men as "[s]uch statement had a tendency to deter employees from honoring picket lines or picketing in the future, was coercive in character and interfered with employees' Section 7 rights."

The Administrative Law Judge, quite correctly in my opinion, also recommended that the matter of the transfers be put to arbitration, citing *Collyer Insulated Wire*, 192 NLRB No. 150. Both Independent and Amalgamated had indicated that they would process grievances for the employees to arbitration.

The Administrative Law Judge then proposed an order, the crucial part of which is as follows:

> "1. The Respondent Packerland Packing Company, Inc., its officers, agents, successors and assigns shall cease and desist from telling employees that due to the fact that they did not report to work during the occurrence of a strike they were no longer considered reliable and were not wanted by the dispatcher as truckdrivers."

It appears to me that in view of the settlement contract entered into by and between Packerland and Amalgamated, particularly with reference to the agreement that the employer not be required to displace any replacement employees, that the only matter here involved was that from which the Administrative Law Judge had ordered the company to cease and desist.

As I have indicated hereinbefore, if the matter had gone to arbitration, no doubt this troublous point in the industrial relations of the company would have long since been settled.

Instead, however, the Board rejected the arbitration recommendation and also found a §8(a)(3) violation in the transfer. The Board disagreed with the Administrative Law Judge's finding which credited Frankenthal's version of the negotiations. This appears to me to be contrary to the recognition to be given to the determination of credibility by the first line trier of fact, as set forth in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).

The Board, in addition to ordering reinstatement with backpay, ordered Packerland to cease and desist from:

> "(a) Discouraging membership in, or activity on behalf of, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local 248, or any other labor organization, by transferring employees or discriminating against them in any other manner in regard to their hire or tenure of employment or any term or condition of employment because they engaged in concerted and union activities.
>
> (b) Telling employees that due to the fact that they did not report to work during the occurrence of a lawful strike they were no longer considered reliable and were not wanted as truckdrivers.
>
> (c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act."

As I have in effect indicated herein, in my opinion, the Board's order should not be enforced, but the order should be confined to that entered by the Administrative Law Judge.

Over and above the *Universal Camera* problem, it appears to me that the Board's order is far too broad-sweeping to call for enforcement by this court.

Of course, if acts constituting an unfair labor practice are found, the Board is free to restrain the practice and other like or related unlawful acts. This, however, should not give the Board the authority to enjoin violations of all the duty provisions of the statute merely because one violation has been found. "To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past." *NLRB v. Express Publishing Co.*, 312 U.S. 426, 437 (1941).

Here there is no evidence of persistent anti-union conduct and that part of the Board's order quoted above under (b) would reach and eliminate the only act which is shown in the record.

As it is, the Board has utilized the broad-sweeping "In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization," etc., when only one act is involved with regard to three employees and even there, under any reasonable interpretation, being an ambiguous situation.

Packerland also complains that the Board's backpay award has not allowed deductions for the portion of the Workmen's Compensation payments which compensated the employees for physical damage, only that part compensating them for loss of earnings, citing *American Manufacturing Co.*, 167 NLRB No. 71 (1967). The Board's answer to this contention is that the

amount of backpay to the discriminatees, as well as appropriate deductions therefrom, are matters for consideration in subsequent backpay proceedings and not by this court at the present time. It is unfortunate if the only way that the company can test the propriety of a claimed deduction against a backpay award is to decline to pay the amounts determined and then litigate in contempt proceedings.

In any event, for the principal reasons, hereinbefore set out, I would limit the enforcement of the order to that ordered by the Administrative Law Judge.

A true Copy:

Teste:

. . . . . .

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals
For the Seventh Circuit

Packerland Packing Company, Inc.,
Petitioner,
v.
National Labor Relations Board,
Respondent.
} No. 73-1518

JUDGMENT

(Filed May 3, 1974)

Before: Pell, Stevens and Sprecher, Circuit Judges.

This Cause came on to be heard upon the petition of the Packerland Packing Company, Inc., to review an order of the

National Labor Relations Board issued against Petitioner on April 25, 1973, and upon the cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on February 15, 1974, and has considered the briefs and transcript of the record filed in this cause. On April 3, 1974, the Court being fully advised in the premises, handed down its opinion denying the petition for review and granting enforcement of the Board's order.

On Consideration Whereof, it is hereby ordered and adjudged by the United States Court of Appeals for the Seventh Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that Packerland Packing Company, Inc., its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

It Is Further Ordered and Adjudged by the Court that costs shall be taxed against the Petitioner.

* . . . . . .
Judge, United States Court of
Appeals for the Seventh Circuit

/s/ JOHN PAUL STEVENS
Judge, United States Court of
Appeals for the Seventh Circuit

/s/ ROBERT A. SPRECHER
Judge, United States Court of
Appeals for the Seventh Circuit

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* Judge Wilbur F. Pell, Jr., dissents for the reasons stated in the opinion.

APPENDIX C

NLRB Decision and Order

United States of America
Before the National Labor Relations Board

Packerland Packing Company, Inc.
and
Ted R. Rockwell, an Individual
} Case 30-CA-1635

Decision and Order

On August 1, 1972, Administrative Law Judge[1] Lowell Goerlich issued the attached Decision in this proceeding. Thereafter, General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order to the extent consistent herewith.

The complaint herein alleged that Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily transferring employees Ted R. Rockwell, Charles Petty, and Ronald Whiting

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[1] The title of "Trial Examiner" was changed to "Administrative Law Judge" effective August 19, 1972.

to more physically exacting jobs because these employees respected a picket line set up by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local 248[2] on June 1 and 2, 1971, and by constructively discharging Rockwell and Whiting because the newly assigned work aggravated job-related injuries causing them to cease work on or about June 7.

The Administrative Law Judge found that Respondent's president, Frankenthal, read a letter to the three employees, at the time of their transfer, which he had received from their truck driving supervisor, Hagemeir. This letter related that due to the fact that the three employees did not report to work (on the days of the strike), they were no longer considered reliable, and he (Hagemeir) did not want them driving for the Company any longer. Finding that the reading of the letter by Respondent was coercive and interfered with the Section 7 rights of the employees, the Administrative Law Judge found that Respondent violated Section 8(a)(1) of the Act. No exceptions were filed to this finding, and we agree with it.

In his further findings, however, the Administrative Law Judge found that Respondent's motive in transferring the three employees was not discriminatory and that it did not violate Section 8(a)(3).

Also, although there was no allegation that Respondent refused to bargain in violation of Section 8(a)(5), the Administrative Law Judge found that Respondent arguably had violated the contracts it had with Amalgamated Meat Cutters and with the Independent Employees Union of Packerland Packing Company[3] by transferring the three employees, and he recommended that the matter be deferred to arbitration.

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[2] Herein called Amalgamated.

[3] Herein called Independent.

The General Counsel excepts to the dismissal of the 8(a)(3) allegation or any deferral to arbitration. We find merit in these exceptions.

The facts, as more fully detailed in the Administrative Law Judge's Decision, show that prior to September 18, 1970, the Independent represented Respondent's production and maintenance employees, including all truck drivers. On September 18, Amalgamated was certified as the representative of Respondent's production and maintenance employees, excluding, among others, "truck drivers." Thereafter, in negotiations between Amalgamated and Respondent, Amalgamated took the position that "city truckdrivers" (as contrasted to the over-the-road drivers), were part of the Amalgamated unit and Respondent took the position that those drivers were excluded from such unit. The matter was not resolved, nor was there specific mention of the city truckdrivers in the contract which was finally executed. (The names of Whiting and Petty, who were "city truckdrivers," appeared on the eligibility list for the election in which Amalgamated was chosen as the bargaining representative, as were the names of other "rendering drivers," and Whiting and Petty had voted without challenge.)

On June 1 and 2, 1971, Amalgamated set up a picket line outside Respondent's plant and city truckdrivers Whiting, Petty, and Rockwell joined in the picket line.

On June 2, Respondent's representatives, including its president, Frankenthal, met with Amalgamated's representatives, including its chief spokesman and vice president, Wentz, in order to work out a contract and make arrangements for the orderly recall of the strikers. After several hours of meetings on that day, including private meetings between Frankenthal and Wentz, the parties reached a memorandum of understanding whereby all of the strikers were to be called back as soon as possible by seniority, as qualified.

Respondent's president, Frankenthal, testified that he had also made an agreement with Wentz during a private meeting that all the strikers returned were to be put in the Amalgamated unit. Wentz denied knowledge of any such private agreement.

After the strike, the alleged discriminatees returned to their jobs as city truckdrivers and worked at these jobs on June 4 and 5. On June 5, Whiting, Petty, and Rockwell were called to Frankenthal's office where they were told by Frankenthal that they were "not in the trucking unit and they would be placed into the bargaining unit which now represents them." At this time, Frankenthal also read to them the letter from the truckdrivers' supervisor, Hagemeir, which stated that these employees were unreliable because they had not worked on June 1 and 2 and he did not want them driving for the Company. Frankenthal then assigned Whiting and Petty to work in the boning room, and Rockwell was assigned to the loading dock.

Rockwell had received a compensable injury to his knee sometime prior to June 7, the day he started work on the loading dock. On June 7, he was assigned to work lugging beef and "lifting fronts on the saw"; work which he had not done for Respondent before and which the evidence showed are two of the most exacting jobs in Respondent's operation. At the end of that day, Rockwell reported to his doctor, who found that Rockwell had aggravated his old injury, and gave him a statement for Respondent requesting light work. When Respondent indicated that there was no light work, Rockwell was forced to go on workmen's compensation. It was later found that Rockwell had also suffered a hernia which was attributed to his job of "lifting fronts." He remained on compensation until September 28.

Similarly, Whiting had received a compensable leg injury in 1965. After much trouble with the leg, including the need

for surgery, he went back to work as a city truckdriver. On June 7, he was assigned to work in the "boning room," which required his working in a standing position, and he aggravated the past injury. He visited his doctor the following day, and thereafter was on workmen's compensation for 2 months.

In dismissing the 8(a)(3) allegation, the Administrative Law Judge evidently credited Frankenthal's version of the negotiations over that of Wentz, and found that Respondent's motive for the transfers of the three alleged discriminatees lies in Frankenthal's effort to fulfill his understanding of the commitment he had with Wentz to return all the strikers to the Amalgamated unit. We disagree with this finding.

The facts of this case show that at the time of transfer, Frankenthal, by reading Hagemeir's letter to the employees, indicated that he was transferring them because they had honored the picket line. This finding is buttressed by the fact that the matter of whether the city truckdrivers were in the Amalgamated unit or not was never resolved, and Amalgamated had not abandoned its claim over these employees. For these reasons, we find that Frankenthal did transfer Petty, Whiting, and Rockwell because of their participation in the strike, in violation of Section 8(a)(3).

Further, even if we were to agree with the Administrative Law Judge that Frankenthal transferred the three employees in order to fulfill its commitment as it understood it, the transfer to the more physically exacting jobs did interfere with the rights of the employees by discouraging their participation in strike activity and would be in violation of Section 8(a)(1).

We also disavow the Administrative Law Judge's deferral of the transfer issue to arbitration. First of all, there was no 8 (a)(5) allegation that Respondent had refused to bargain with either of the two Unions over the transfer. With regard to deferring the 8(a)(3) allegations, although the Independent now claims that it will grieve the matter for the employees who

were transferred if they request it, and Amalgamated claims that it will grieve the matter if it is found that the city truckdrivers belong in the Amalgamated unit, it is not clear whether the city truckdrivers belonged in either unit at the time of the transfers. Also, the Independent refused shortly after the transfers to represent the employees in a grievance procedure. We therefore do not believe that deferral to the grievance procedures is appropriate in this case.[4]

Rockwell and Whiting were both transferred from their jobs as city truckdrivers to more physically exacting jobs in the plant on June 7, although both had suffered compensable injuries in the past, and Respondent was aware of their physical difficulties. As a result of these transfers, found herein to be discriminatory, both employees suffered aggravation of these old injuries, and Rockwell also suffered a hernia, and they were both required to be out of work for some time thereafter.

As Respondent's discriminatory transfer of these employees placed them in a situation where the risk of aggravating these past injuries was markedly increased, it is therefore responsible for the aggravation of the injuries, and for Rockwell's and Whiting's inability to work because of the injuries. Accordingly, in order to make these employees whole for any losses suffered due to their inability to work, we shall award them backpay from the date of their transfers.

REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

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[4] For reasons stated in his dissenting opinions in *Collyer*, 192 NLRB No. 150, and subsequent cases, Member Fanning would not, in any event, defer to arbitration in this case.

As we have found that Respondent transferred Ted R. Rockwell, Charles Petty, and Ronald Whiting in violation of Section 8(a)(3) and (1) of the Act, we shall order it to offer Petty and Rockwell[5] immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and we shall order it to make Rockwell and Whiting[6] whole for any loss of earnings they may have suffered by reason of their unlawful transfers, and resultant loss of work due to injuries. Added to the award of wages lost to Rockwell and Whiting shall be interest at the rate of 6 percent per annum in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

As Respondent's unfair labor practices violated fundamental employee rights guaranteed by the Act, we deem it appropriate to add to our Order a provision requiring Respondent to cease and desist from infringing upon employee rights guaranteed by the Act in any manner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Packerland Packing Company, Inc., Green Bay, Wisconsin, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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[5] Ronald Whiting was returned to his job as city truckdriver prior to the issuance of the Administrative Law Judge's decision in this case.

[6] The record shows that Petty suffered no loss of earnings.

(a) Discouraging membership in, or activity on behalf of, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local 248, or any other labor organization, by transferring employees or discriminating against them in any other manner in regard to their hire or tenure of employment or any term or condition of employment because they engaged in concerted and union activities.

(b) Telling employees that due to the fact that they did not report to work during the occurrence of a lawful strike they were no longer considered reliable and were not wanted as truckdrivers.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer Charles Petty and Ted R. Rockwell immediate reinstatement to their former city truckdriving jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(b) Make Ted R. Rockwell and Ronald Whiting whole in the manner set forth in the Remedy section hereof for any loss of earnings they may have suffered by reason of the discrimination against them.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Green Bay, Wisconsin, plant copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 30, after being duly signed by Respondent representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., April 25, 1973.

JOHN H. FANNING
Member

RALPH E. KENNEDY
Member

JOHN A. PENELLO
Member
National Labor Relations Board

(Seal)

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[7] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Appendix

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

After a trial in which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the law and has ordered us to post this notice.

WE WILL NOT transfer any employee or otherwise discriminate against him because of his membership in, or activities on behalf of, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, Local 248, or any other labor organizations.

WE WILL NOT tell our employees that due to the fact that they did not report to work during the occurrence of a strike they are not considered reliable and are not wanted as truckdrivers.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL offer Charles Petty and Ted R. Rockwell immediate reinstatement to their former city truckdriving jobs or to substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

WE WILL make Ted R. Rockwell and Ronald Whiting whole for any loss of earnings suffered by reason of the discrimination against them.

PACKERLAND PACKING COMPANY, INC.
(Employer)

Dated ..... by .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Commerce Building, Second Floor, 744 North Fourth Street, Milwaukee, Wisconsin 53203, Telephone 414—224-3861.

APPENDIX D

Administrative Law Judge's Decision and Recommended Order

United States of America
Before the National Labor Relations Board
Division of Trial Examiners
Washington, D. C.

Packerland Packing Company, Inc.

and

Ted R. Rockwell, an Individual

Case No. 30-CA-1635

George Strick, Esq., and Alex V. Barbour, Esq., of Milwaukee, Wis., for the General Counsel.

James A. Gilker, Esq., of Fort Smith, Ark., and Bernard Berk, Esq., of Green Bay, Wis., for the Respondent.

Ted R. Rockwell, of Green Bay, Wis., for the Charging Party.

Theodore R. Mueller, Esq., of Green Bay, Wis., for Ronald Whiting, Charles Petty and Independent Truck Drivers Employees, Packerland Packing.

Richard Greenlaw, of Milwaukee, Wis., and Victor Bobrowicz of Green Bay, Wis., for Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO Local 248.

Trial Examiner's Decision
Statement of the case

Lowell Goerlich, Trial Examiner: A charge was filed by Ted R. Rockwell, an individual, on June 22, 1971[1] and upon the same date the charge was served by registered mail upon Packerland Packing Company, Inc., the Respondent herein. A complaint and notice of hearing was issued on August 4, in which it was alleged that the Respondent had violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, by discriminatorily transferring Ted R. Rockwell, Charles Petty and Ronald Whiting to more physically exhausting jobs because said employees respected a picket line at Respondent's premises on June 1 and 2 and by constructively discharging Rockwell and Whiting because the assigned work aggravated preexisting job-related injuries causing them to cease work on or about June 7.

The Respondent filed timely answer in which it denied that it had engaged in any of the unfair labor practices alleged.

The case came on for hearing on September 22, 1971, at Green Bay, Wisconsin. The Respondent moved that the complaint be dismissed "because of failure of the Board to include as parties herein the Amalgamated Meat Cutters and the Independent Packerland Employees Union and for the further reason that the Company's position is that the—this matter currently brought before the Board should be deferred to arbitration under the terms of one or the other of the two contracts."[2]

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[1] All dates refer to 1971 unless otherwise noted.

[2] At this point the General Counsel had offered to stipulate that: there were two bargaining units of the Respondent's employees; the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, herein referred to as the Amalgamated, was certified by the Board in Case No. 30-RC-1224 on September 18, 1970, in a unit consisting of "all production and maintenance employees of the employer at its Green Bay, Wisconsin, plant. Excluding office

In view of the Respondent's motion to defer the matter to arbitration the Trial Examiner ruled that the Amalgamated and the Independent, being parties to contracts with the Respondent which arguably covered the arbitration process, were necessary parties to the proceeding. Pursuant to this ruling the Trial Examiner allowed the General Counsel time in which to serve the Amalgamated and Independent. Each was subsequently served and appeared at the hearing which reconvened on the next day. Upon the entry of appearance of the two Unions the Trial Examiner overruled the motion of the Respondent to dismiss the complaint and reserved ruling on its motion to defer the matter of arbitration.[3]

During the proceedings on September 23, 1971, counsel for the Independent raised a question in respect to the settlement of the issues before the Trial Examiner and stated among other things, "I think the parties are here and it's pertinent. And there is nothing we have to hide here. Let's dispose of this matter.

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clerical employees, truckdrivers, professional employees, guards and supervisors as defined in the Act"; at the beginning of October 1970, Respondent and the Amalgamated commenced collective-bargaining negotiations; that on June 1 and 2, 1971, the Amalgamated called an economic strike among the employees in its bargaining unit; during the afternoon of June 2, 1971, the parties agreed on the terms of a collective-bargaining agreement which was signed the following day, June 3, 1971; the effective date of that agreement is from June 1, 1971 to February 28, 1975; the Independent Employees Union of Packerland Packing herein referred to as the Independent, is the recognized collective-bargaining representative in a contractually described unit of "all truckdrivers"; the current contract between the Independent and Respondent is effective from January 23, 1971 until January 24, 1974.

[3] The attorney for the Independent stated, "I would like to make the motion that the proceedings be dismissed and that we represent the three people under our contract: And that we will process a written grievance if they present us with a written grievance which I feel that they probably will. And we will take the grievance to the grievance procedure, and then if it is not satisfactorily handled through the grievance procedure, we take the position that we will take it to its final stage which is arbitration under our agreement." Ruling on this motion was also reserved.

The people are here. They want their jobs back immediately, and they are not interested in any prolonged litigation. Company has offered them their jobs back. If those parties are satisfied, why shouldn't the Government be satisfied?" The Respondent proposed the following settlement: As to reinstatement, Ted Rockwell and Charles Petty were offered jobs to be agreeable to them in the offal department and on the boning line in the boning room respectively and Whiting was offered his old job back subject to medical testimony and subject to the further condition that he must understand that if he could not measure up there would have to be a reassignment; as to backpay (which involved only Rockwell and Whiting), the Respondent offered to first discuss backpay with the parties involved and if it was not resolved through discussion the backpay issue would be referred to final and binding arbitration; as to the posting of a notice, the Respondent offered to post a notice which would make clear that it would not discriminate against employees for appearing on picket lines or respecting picket lines at its premises. The offer conditioned upon the incorporation of a disclaimer clause in the settlement agreement and a stipulation that the fact the Respondent had entered into a settlement agreement would not be used by the arbitrator in drawing any inference of misconduct.

Thereupon, the Trial Examiner proceeded to hear the position of all parties in respect to the proposed settlement agreement. The General Counsel moved "to discontinue any further discussion on the settlement proposal that has been offered and immediately permit the General Counsel to proceed with the presentation of evidence and testimony on the merits of its case." The Trial Examiner denied such motion and commented, "What you would have me do at this point is simply to deny the Respondent an opportunity to propose a settlement which may or may not be agreeable to the parties and have the Trial Examiner consider it. Now, is that due process of law? . . . I certainly shall evaluate your point of view as I evaluate the points

of view of each person who wants to address the Trial Examiner. But because that is your point of view, that doesn't foreclose my listening to another party's point of view and that's what you would have me do. You would have me . . . [f]oreclose the right of the Independent to speak on the subject, the right of the three discriminatees who are represented by themselves to speak on the subject, and the right of the Respondent to speak on the subject, and the right of Amalgamated to speak on the subject because you have already prejudged that the settlement which has been proposed does not fall in line with what you think is the precedence (sic) of the Board." Thereupon, the General Counsel stated: "I am asking for an adjournment so I can make an interim appeal to the Board by the denial of General Counsel's motion to suspend further discussion of the settlement proposal and to proceed with the presentation of testimony on the merits of the case." This request was denied and the Trial Examiner proceeded to hear the position of the parties upon the proposed settlement. The General Counsel requested a recess in order that he could make a direct appeal to the Board from the Trial Examiner's "refusal to discontinue the consideration of the settlement offer and proceed with the hearing." Such recess was granted. General Counsel again moved for an adjournment for the purpose of perfecting an appeal to the Board from the Trial Examiner's denial of the General Counsel's motion that "the Trial Examiner should defer from the consideration of proposed settlement and immediately proceed to the trial of issues in this case." The Trial Examiner being of the opinion that the motion of General Counsel raised important questions relating to the substantial rights of the parties and the Board's procedures which ought to be resolved granted the General Counsel's motion for an adjournment. The Trial Examiner commented in part ". . . [the] Trial Examiner is prone to grant the motion at this time for continuance of this matter on representation of the General Counsel that the ruling of the Trial Examiner on the specific motion stated is being presented to the Board for review. . . . Trial Examiner thinks it's im-

portant to have determined in this case whether Trial Examiner has exercised appropriate power in allowing the Respondent to present a proposed settlement agreement and in permitting the parties to state their positions on the record as to whether he should approve it as effectuating the policies of the Act. It strikes the Trial Examiner that this is important in the administration of the Act. It is important because as the Trial Examiner understands it, the Board is interested that cases come[ing] before it be settled if possible by agreement between the parties since in this [manner] the controversy is removed from causing interference with interstate commerce. Moreover, that is a step toward effecting the policy of the Act, that [is], the procedures and practices of collective bargaining be encouraged."

In due course, the Board entered an order on January 20, 1972. The Board granted the General Counsel's request for permission to appeal certain rulings of the Trial Examiner but did not directly pass upon the Trial Examiner's denial of the General Counsel's motion to discontinue the consideration of the Respondent's settlement proposal and proceed with the hearing. Although the record does not disclose that the Trial Examiner had ruled upon the question of whether or not the settlement agreement ought to be approved or disapproved, the Board further ordered "that the General Counsel's motion to vacate the proposed settlement agreement and to remand the case for hearing before a Trial Examiner upon the issues framed by the pleadings be, and it hereby is, granted." In conformity with the Board's order, the hearing reconvened on February 15 and 16, 1972. At the close of the hearing on the latter date, the General Counsel moved for a continuance in order to enforce certain subpoenas. The continuance was granted. The hearing was reconvened on May 11 and then again on June 5, 1972.

During the trial each party was afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and

conclusions and to file briefs. All briefs have been carefully considered by the Trial Examiner.

Upon the whole record and upon his observation of the witnesses, the Trial Examiner makes the following:

Findings of Fact, conclusions, and reasons therefor

I. The Business of the Respondent

The Respondent, a Wisconsin corporation, is engaged in the processing, packing, and transportation of meat products with its office and facilities located in Green Bay, Wisconsin. During the past calendar year, a representative period, the Respondent sold and shipped in interstate commerce products valued in excess of $50,000 to points located outside the State of Wisconsin.

The Trial Examiner finds that at all times material herein Respondent is and has been an employer as defined in Section 2(2) of the Act, engaged in commerce and in operations affecting commerce as defined in Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

The Amalgamated and the Independent are and have been at all times material herein labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Pertinent Facts

For some time prior to September 18, 1970, the Independent was the collective-bargaining agent of all production and main-

tenance employees of the Employer including truckdrivers, excluding office clerical employees, professional employees, guards and supervisors, as defined in the Act. On September 18, 1970, the Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO, was certified by the Board in Case No. 30-RC-1224 in a unit consisting of "all production and maintenance employees of the Employer at its Green Bay, Wisconsin, plant. Excluding office clerical employees, truckdrivers, professional employees, guards, and supervisors as defined in the Act," herein referred to as the Amalgamated unit. Thereafter negotiations were commenced between Amalgamated and the Respondent. A strike ensued on June 1, which was resolved on June 2, by the agreement on terms of a contract. During the strike a picket line was established at the Employer's premises. In addition to those employees conceded to fall within Amalgamated's unit, joining such picket line were the alleged discriminatees, Ted R. Rockwell, Ron Whiting and Charles Petty, who were employed as city truckdrivers, and C. Peterson, a rendering plant truck driver. Around 250 employees participated in the strike; about 125 replacements were hired during the strike.

During negotiations the parties had not been in agreement as to the unit placement of the three city truckdrivers. The Respondent maintained that the city truckdrivers should be excluded from the Amalgamated unit whereas Amalgamated claimed their inclusion. This matter was not resolved nor was there specific mention of the city truckdrivers in the executed contract. Prior to the strike the three city truckdrivers operated semitrailer trucks (six-wheelers) between the Company's plant and Atlas Cold Storage, a distance of about 2½ miles. Their cargo consisted of meat products obtained from the boning room, the fabricating room and the offal department,[4] all a part

[4] At the time of the strike Petty regularly hauled from the offal department and Whiting and Rockwell regularly hauled from the boning room.

of the Amalgamated unit. A round trip between the Company's plant and Atlas Cold Storage consumed about 1 hour and a-half. Actual driving time was about an hour. The number of trips varied per day depending on the amount of products ready for hauling. The drivers unloaded the trucks at Atlas Cold Storage with a tow motor. When the trailers were not loaded for them they also loaded the trailers with a tow motor. When the drivers were not employed in truckdriving or loading and unloading they sometimes spotted trailers,[5] or performed other tasks such as loading over-the-road trailers, or stacking boxes from the packing line on skids.

These trailers were regularly assigned for hauling meat products to Atlas Cold Storage. Tractors were obtained by the drivers each morning from those which were unassigned to other employer vehicles. The drivers were under the supervision of the dock foremen and the supervisors attached to the departments for which they hauled products. Each driver was an hourly paid employee. Petty was paid the top rate for the offal department. Rockwell and Whiting were paid the rates of a truck spotter.

In addition to the three city truckdrivers the Respondent employed 16 truckdrivers in the rendering division and 18 or 20 over-the-road truckdrivers. The rendering division was housed in a separate building. A separate seniority list was maintained for the over-the-road truckdrivers.

The names of Whiting and Petty and the truckdrivers in the rendering division[6] appeared on the Excelsior list and the voter's

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[5] Whiting testified that other than truckdriving he did only spotting.

[6] At the first negotiation meeting between the Respondent and the Amalgamated on October 12, 1970, the Amalgamated proposed a negotiating committee including one of the Respondent's rendering drivers, Dennis Surprise. The Respondent maintained that truck-

eligibility list for the election in which Amalgmated was chosen as the bargaining agent. Whiting and Petty voted in the election without challenge.

On June 2 representatives of the Amalgamated and the Respondent met in the offices of Federal Mediation and Conciliation Service in Green Bay. During that day there were private meetings between Respondent's president, S. W. Frankenthal, Respondent's attorney, James A. Gilker, and Amalgamated's vice-president and chief spokesman, Ray F. Wentz. At one of these meetings between Frankenthal and Wentz, Frankenthal said, "Ray, now are we all settled?" Wentz answered, "Yes, except for one thing. I want you to take back all the people who are now out. I have to get them off the concrete." Frankenthal replied, "Ray, there is a few people that I don't think are in your union that are out." Wentz said, "You take them back in my union." During these discussions Frankenthal also told Wentz that he "could not promise that each person would have their own kind of job that they had previous to the strike; but that we would put them to work—some kind of work. . . ."[7] On the same day Frankenthal told Wentz and Mat Pinter, an Amalgamated representative, "I'll take these people back. How soon I just can't tell you, but I'll take them back, and they'll go in the unit." Thereafter a memorandum of understanding was reached whereunder the parties agreed that:

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drivers were not a part of the Amalgamated's unit. Surprise did not thereafter sit on the committee. On October 23, 1970, a committee representing over-the-road drivers, rendering drivers and city drivers, "representing themselves as the independent union," among whom were Surprise and Rockwell, met with Respondent's president S.W. Frankenthal and Respondent's secretary-treasurer Wobkin. No agreement was reached because the Respondent "felt that until the issue of which union represented them, it would be best not to discuss the issues." As to the rendering drivers Wentz testified that "we weren't too much concerned about them, very frankly."

[7] Wentz admitted engaging in private meetings and quoted Frankenthal as saying ". . . it would be only a short time—we will have them all back to work. I'll cooperate as much as I possibly can to see they are taken care of. . . ."

> All employees who participated in the strike on June 1 and June 2, 1971, will be called back to the employment of the employer as the needs of the business require. It is understood and agreed that such callbacks will be made as expeditiously as possible in seniority, as qualified, but nothing in the agreement between the parties shall require the employer to displace any current employees from employment to effect such call back. . . . However, the parties have agreed in good faith that a reasonable effort will be made to call back employees as soon as possible in accordance with the requirements of the business.

All strikers ultimately returned to work.

After the strike was terminated the three truck drivers returned to the truck driving jobs they had performed immediately prior to the strike and worked as city truck drivers on June 4 and 5.

On June 4 Plant Superintendent Robert J. Rotter was called by Frankenthal "to account for all the people who had been recalled." During the accounting the names of Whiting, Rockwell, Petty and Peterson were mentioned. Upon learning that these employees had not beeen returned to Amalgamated's unit as he defined it, Frankenthal, commenting that the Respondent might be "at fault for calling them back into an area where they're not in the unit," instructed Rotter that "if [he] couldn't do the job, he would reassign them himself." Thereafter Rotter offered Peterson a job in the "bargaining unit which he chose to belong to." Peterson declined and is now employed elsewhere.

On June 5 Whiting, Petty and Rockwell were called to the office of Frankenthal, where in the presence of Rotter, Frankenthal told them that they were "not in the trucking unit and they would be placed in to the plant . . . into the bargaining unit which now represented them." Whiting and Petty were assigned to the boning room and Rockwell was assigned to the

loading dock. During the conversation Frankenthal read from a letter of truck dispatcher Harlan Hagemeir that "due to the fact that [the alleged discriminatees] did not report to work on Tuesday and Wednesday of that week, that [they] were no longer considered reliable, and he [Hagemeir] did not want [them] driving for the Company no more."[5]

Some time prior to June 7, Rockwell had received a compensable injury to his knee. On June 7, when Rockwell reported to the loading dock he informed Foreman Larry Denamer that he had a doctor's appointment at 11:30 a.m. Denamer assigned him to lugging beef on the loading dock which required carrying quarters of beef averaging between 150 and 210 pounds on the shoulder from the loading dock into a trailer. The distance traveled varied from 10 to 50 feet. Rockwell worked at this job for about 1½ hours at which time Denamer directed him to cancel his doctor's appointment and accompany him to the fabricating room to "lift fronts onto the saw." The fronts weighed about 200 pounds. After working at this job for about an hour and a half he returned to lugging beef. Later he returned again to the fabricating room for about 2 hours after which he returned to lugging beef. During the period he

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[5] The Trial Examiner considers neither Frankenthal nor Rockwell to be wholly reliable witnesses. Rotter was more trustworthy. The Trial Examiner believes that the part quoted above from the Hagemeir letter was read by Frankenthal for the following reasons: (1) Reluctant witness Petty who testified only by court order testified, "It was in there, the unreliable truckdriver, . . ," (2) Whiting, another reluctant witness who testified by court order, by his lapse of memory in regard to the Frankenthal meeting of June 5 and his demeanor while testifying, created a strong inference that he was deliberately avoiding the disclosure of facts prejudicial to his employer. (3) Rotter was unsure whether Frankenthal read from a letter. (4) Hagemeir was not called by the Respondent to testify as to whether he had or had not submitted the alleged letter to Frankenthal. The failure to call an available witness who is an agent of a party and has knowledge of controverted facts warrants an inference, that, if called, the witness' testimony would have been adverse. *Interstate Circuit, Inc.*, 306 U.S. 208, 226, *N.L.R.B. v. Ohio Calcium Co.*, 133 F.2d 721, 726 (C.A. 6).

lugged between 300 and 350 quarters to the dock and lifted between 275 and 300 fronts in the fabricating room. Prior to June 7 he had not performed any of these tasks for the Respondent. Lugging beef and lifting quarters are two of the most physically exacting tasks in the Respondent's operation.

Later that day when Rockwell appeared for his doctor's appointment his doctor found that his knee was badly swollen. He gave him a shot of cortisone. He also gave Rockwell a written statement to be given to the Respondent in which light work was requested.

Rockwell arrived at work on June 8 with the doctor's statement. Rotter told him the Respondent had no light work and that the only thing that could be done was to put him on workmen's compensation. Thereafter Rockwell received workmen's compensation until he returned to work on September 28, at which time he took a job loading boneless beef on over-the-road trailers. The wage scale was the same as that which he had received as a city truckdriver. In the interim he was discovered to have suffered a hernia in his right groin which was attributed to slipping while lifting fronts on June 7.

Whiting had also received a compensable injury which occurred to his leg in September 1965. Thereafter his foot "kept bothering" him and he "had to go back for surgery again." When he returned to work he was given a job as city truckdriver.

On June 7, after the Frankenthal meeting of June 5, he commenced work in the boning room, boning "out navels" which weigh an average of 8 to 12 pounds. The work was performed in a standing position. At the end of the day Whiting "hardly could walk." The next day Whiting visited Dr. McGuire and thereafter received compensation for 2 months. He has since returned to the Respondent's employment as a city truckdriver.

Petty, on June 7, was assigned to boning rounds in the boning room. The rounds weighed from 40 to 80 pounds. Rotter described the process:

"He stands at the table, the conveyor belt goes down the center of this table, he takes a meathook, pulls the meat towards him; and when it is in front of him in position, then, he bones."

The average temperature in the boning room is between 35 and 45 degrees. In comparison to a truckdriver's job Petty testified that "there's a strain on your arms boning meat . . . compared to truckdriving"; "it was harder . . . you'd be using more muscles . . ."

Petty boned rounds for about 2½ months after which he was assigned to the offal department where he now works by choice.

B. Conclusions and Reasons Therefor

The General Counsel maintains that "the Respondent discriminatorily transferred employees Rockwell, Whiting and Petty off the city trucks, and/or to more onerous jobs in violation of Section 8(a)(3) and (1) of the Act because they supported and participated in the strike called by the Meat Cutters." The Supreme Court has said, "We have determined that the 'real motive' of the Employer in an alleged 8(a)(3) violation is decisive." *N.L.R.B. v. Brown,* 380 U.S. 278, 287. Thus we must look to the Respondent's "real motive" for the transfers to ascertain whether there is a violation of Section 8(a)(3). The Trial Examiner is convinced that Frankenthal's sole motive in transferring Petty, Whiting and Rockwell was to fulfill his understanding of the commitment to Wentz to return the employees who had ceased work during the strike to the Amalgamated unit and that the transfers of Whiting, Petty and Rockwell were

not discriminatory.[9] This conclusion is buttressed by the fact that rendering plant truckdriver Peterson who was the only driver who observed the picket line was likewise ordered to transfer into the Amalgamated unit. "Discrimination consists of treating like cases differently." *Frosty Morn Meats, Inc. v. N.L.R.B.*, 296 F.2d 617, 621. Accordingly the Trial Examiner finds that by the transfers of Whiting, Petty and Rockwell the Respondent did not violate Section 8(a)(3) or (1) of the Act as claimed by the General Counsel. Nevertheless, the Trial Examiner further finds that the Respondent did violate Section 8(a)(1) of the Act by Frankenthal's reading of Hagemeir's letter to Whiting, Rockwell and Petty to wit: "due to the fact that [Whiting, Rockwell and Petty] did not report to work on Tuesday and Wednesday of that week [they] were no longer considered reliable, and he [Hagemeir] did not want [them] driving for the Company no more." Such statement had a tendency to deter employees from honoring picket lines or picketing in the future, was coercive in character and interfered with employees' Section 7 rights.

While the General Counsel did not allege the violation of Section 8(a)(5) and (d) of the Act, material evidence introduced and the matters put in litigation indicate that the Respondent arguably violated the contracts of the Independent and the Amalgamated by the transfers of Whiting, Petty and Rockwell from city truckdriver jobs to other jobs after the strike. In view of the motions of the Independent and the Respondent, the Trial Examiner recommends that such matter be deferred to arbitration. See *Collyer Insulated Wire*, 192 NLRB No. 150. Deferral to arbitration will be in accordance with the Board's policy as expressed in *Norfolk, Portsmouth Wholesale Beer Distributors Association*, 196 NLRB No. 15. "Since we believe it to be consistent with the Federal labor policy to promote peaceful resolu-

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[9] The Trial Examiner makes no finding as to whether or not Frankenthal in effecting the transfers complied with the contractual obligations which bound the Respondent.

tions of contractual controversies through the methods agreed upon by the parties, we shall not decide the merits of this controversy, but rather shall defer the matter to be resolved in accordance with the agreed-upon grievance procedure." See also *Urban N. Patman, Inc.*, 197 NLRB No. 150.

Conclusions of law

1 The Amalgamated and the Independent are labor organizations within the meaning of the Act.

2. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act for jurisdiction to be exercised herein.

3. By transferring Ted R. Rockwell, Ron Whiting and Charles Petty on June 7, 1971, the Respondent did not engage in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

4. By telling employees Rockwell, Petty and Whiting that "due to the fact that [they] did not report to work on Tuesday and Wednesday of that week [during the occurrence of a strike] [they] were no longer considered reliable, and [the dispatcher] did not want [them] driving for its company no more," the Respondent violated Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

Recommended Remedy

It having been found that the Respondent has engaged in certain unfair labor practices it is recommended that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

Upon the foregoing findings of fact and conclusion of law and the entire record and pursuant to Section 10(c) of the Act, the Trial Examiner hereby issues the following recommended:[10]

ORDER

1. The Respondent Packerland Packing Company, Inc., its officers, agents, successors and assigns shall cease and desist from telling employees that due to the fact that they did not report to work during the occurrence of a strike they were no longer considered reliable and were not wanted by the dispatcher as truckdrivers.

2. Take the following affirmative action which will effectuate the policies of the Act.

(a) Post at its Green Bay, Wisconsin, plant copies of the attached notice marked "Appendix."[11] Copies of said notice, on forms provided by the Regional Director for Region 30 shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

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[10] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[11] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(b) Notify the Regional Director for Region 30, in writing within 20 days from receipt of this Decision, what steps have been taken to comply herewith.[12]

Dated at Washington, D. C.

LOWELL GOERLICH
Trial Examiner

Appendix

NOTICE TO EMPLOYEES
Posted by Order of the National Labor Relations Board
An Agency of the United States Government

We Will Not tell our employees that due to the fact that they do not report to work during the occurrence of a strike they are not considered reliable and are not wanted by the dispatcher as truckdrivers.

PACKERLAND PACKING COMPANY, INC.
(Employer)

Dated..... By.....
(Representative) (Date)

This Is an Official Notice and Must Not Be Defaced by Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Commerce Building, 2nd Floor, 744 North 4th Street, Milwaukee, Wis. 53203. Telephone (414) 224-3861.

[12] In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

APPENDIX E

Statutory Provisions Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*) are as follows:

> Section 157: Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> Section 158(a): It shall be an unfair labor practice for an employer . . .
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> * * * * * * *
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
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> * * * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; . . .
>
> * * * * * * *
>
> Section 160(c): The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argu-

ment. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . .

* * * * * * *

Section 160(e): The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record of the proceedings, as provided in section 2112 of title 28, United States Code . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * * * * * *

Section 185(a): Suits for violation of contracts between an employer and a labor organization representing employees

employed in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-122

PACKERLAND PACKING COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A11) is reported at 494 F. 2d 293. The decision and order of the National Labor Relations Board (Pet. App. A13-A23) are reported at 203 NLRB No. 39.

JURISDICTION

The judgment of the court of appeals (Pet. App. A11-A12) was entered on May 3, 1974, and the company's petition for rehearing was denied on May 20, 1974 (Pet. App. A1). The petition for a writ of certiorari was filed on August 15, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the company violated Section 8(a)(3) and (1) of the National Labor Relations Act by transferring three employees because of their union activities.

2. Whether the Board properly declined to require that the transfer issue be submitted to arbitration.

3. Whether the Board's order is too broad.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. A42-A44.

STATEMENT

A. The Board's Findings of Fact

Prior to September 1970, the Independent Employees Union of Packerland Packing Company ("the Independent") had represented the Company's production and maintenance employees, including all truck drivers (R. 28, 12).[1] In September 1970, the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO ("the Amalgamated") was certified as the representative of the Company's production and maintenance employees, excluding truck drivers (R. 28, 12, 44). In the negotiations that followed, the Amalgamated and the Company disagreed regarding placement of the Company's three "city truck drivers," Ted Rockwell, Ron Whiting, and Charles Petty, within the unit.[2] The Company maintained that the city truck drivers should be excluded

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[1] "R." refers to the appendix to the briefs in the court below.

[2] The Company also employed a number of over-the-road drivers, who continued to be represented by the Independent.

from the unit, while the Amalgamated claimed that they should be included (R. 28, 12, 108-110, 172-173, 175, 182, 220-221, 230).[3]

On June 1, 1971, Amalgamated called a strike over contract terms, and set up a picket line outside the Company's plant. In addition to those employees ~~who~~ conceded to fall within the Amalgamated unit, city truck drivers Rockwell, Whiting, and Petty joined the picket line (R. 28, 12, 85-86, 126, 198, 214).

On June 2, Company President S.W. Frankenthal and Amalgamated Vice President Ray Wentz met for the purpose of concluding a contract and arranging for the recall of the strikers (R. 29, 14, 111-112, 173). During this meeting, Frankenthal asked Wentz if they were "all settled," and Wentz replied, "Yes, except for one thing. I want you to take back all the people who are out now." When Frankenthal stated that there were a few people on strike that were not in the Amalgamated, Wentz replied, "You take them back in my union" (R. 14, 234). During the meeting, Frankenthal also told Wentz that he could not promise that each employee would have the same kind of job that he had previous to the strike but that the Company "would put them to work—some kind of work" (R. 14-15, 236). In addition, Frankenthal told Wentz and another Amalgamated representative that he would "take these people back," and that they would "go in the unit" (R. 15, 88).

At the conclusion of the meeting, the Company and the Union executed a memorandum of understanding providing, *inter alia*, that all employees who participated in the strike would be called back "as the needs of the busi-

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[3] The matter was never resolved and there was no specific mention of the city truck drivers in the contract which was finally executed on June 3, 1971 (R. 28, 12, 110, 261).

ness require." All strikers ultimately returned to work; Rockwell, Whiting, and Petty returned to their jobs as city truck drivers and worked at these jobs on June 4 and 5 (R. 29, 15, 128).

On June 5, however, Rockwell, Whiting, and Petty were called into Frankenthal's office and told by him that they were "not in the trucking unit and that they would be placed into the plant * * * into the bargaining unit which now represented them" (R. 29, 16, 225-226). Frankenthal also read a letter from the drivers' supervisor, Harlan Hagemeir, which stated that, since Rockwell, Whiting, and Petty did not report to work on June 1 and 2, they were no longer considered reliable, and Hagemeir did not want them driving for the Company any longer (R. 27, 16, 128). Frankenthal then assigned Whiting and Petty to the boning room, and Rockwell to the loading dock (R. 29, 16; 225-227).

On June 7, Rockwell, Whiting, and Petty began their new jobs, all of which were more physically exacting than city truck driving. Although Rockwell and Whiting had previously sustained compensable leg injuries on the job, they were assigned jobs such as lifting 200 pound "fronts," carrying beef, and boning "rounds" in a standing position. As a result, both Rockwell and Whiting aggravated their old injuries, and had to be put on workmen's compensation for several months. Petty, meanwhile, was assigned the job of pulling and boning 40 to 80 pound rounds of beef in a room with a temperature between 35 and 40 degrees. (R. 29, 30, 16-18, 106-107, 123-124, 130-136, 147, 193, 204-208.)

B. The Decisions Below

The Board adopted the Administrative Law Judge's finding that the Company violated Section 8(a)(1) of the

Act by telling employees Rockwell, Whiting, and Petty that they were no longer wanted as truck drivers by the Company because they did not report for work during the strike (Pet. App. A14). The Board further found that the Company violated Section 8(a)(3) and (1) of the Act by transferring Rockwell, Whiting, and Petty to more physically exacting jobs because of their participation in the strike, not—as the Law Judge found—because of Frankenthal's commitment to Wentz to return all strikers to the Amalgamated unit (Pet. App. A17). Finally, contrary to the Law Judge, the Board declined to defer the issue of the transfers to arbitration under either the Amalgamated or the Independent contracts, because it was not clear whether the city truck drivers belonged in the Independent or the Amalgamated unit at the time of the transfers and the Independent had refused to represent the drivers under the grievance procedure shortly after the transfers (Pet. App. A17-A18).

The Board ordered the Company, *inter alia*, to cease and desist from the unfair labor practices found, and from in any other manner interfering with, restraining, or coercing employees in the exercise of their statutory rights (Pet. App. A19-A20).

The court of appeals, with one judge dissenting, upheld the Board's findings and enforced its order (Pet. App. A2-A11).

ARGUMENT

1. The initial issue raised by the petition is whether there is substantial evidence to support the Board's finding that the Company transferred Rockwell, Whiting, and Petty to less desirable jobs as a reprisal for their participation in the strike. That evidentiary issue does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340

U.S. 474, 490-491. In any event, the facts summarized above (pp. 2-4) show that there is ample basis for the Board's finding.[4]

2. Petitioner's contention (Pet. 14-18) that the Board erred in declining to require that the issue of the transfers be submitted to arbitration is without merit. The Board has broad discretion to determine whether it will exercise its power to remedy an unfair labor practice rather than defer to the arbitral process. *Carey* v. *Westinghouse*, 375 U.S. 261; *National Labor Relations Board* v. *Strong*, 393 U.S. 357, 360-362. In *Collyer Insulated Wire*, 192 NLRB 837, the Board announced a policy of deferring to arbitration in cases where "the contract clearly provides for grievance and arbitration machinery * * * and it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act." Here, however, in light of the uncertainty as to the unit placement of the three drivers and the willingness of either union to represent them properly (*supra*, p. 3), the Board did not abuse its discretion in declining to defer to abritration.[5]

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[4]Contrary to petitioner's assertion (Pet. 11-14), the Board did not overrule the findings of fact of the Administrative Law Judge, but drew different inferences from those findings, including the undisputed finding that Vice President Frankenthal indicated to the discriminatees that he was transferring them because they had failed to report for work during the strike (Pet. App. A17).

[5]These factors were not present in the deferral cases cited by petitioner (Pet. 15-17).

3. Finally, petitioner's contention (Pet. App. 18-19) that the portion of the Board's order directing it to cease and desist from "in any other manner" abridging its employees' statutory rights is overly broad turns on the facts of this particular case. Here the Board reasonably concluded that, since the Company's conduct in transferring the three employees to more onerous jobs because of their participation in the strike "violated fundamental employee rights guaranteed by the Act" (Pet. App. A19), a broad remedial order was required. See *National Labor Relations Board* v. *Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C.A. 4); *National Labor Relations Board* v. *United Mineral & Chemical Corp.*, 391 F. 2d 829, 837-838 (C.A. 2); *P.R. Mallory* v. *National Labor Relations Board*, 400 F. 2d 956, 959-960 (C.A. 7), certiorari denied, 394 U.S. 918.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,

JOHN S. IRVING
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

WILLIAM M. BERNSTEIN,
Attorney,
National Labor Relations Board.

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